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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 710

CLYDE C. WINSLOW,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

JOHN R. GOLDEN,
Crocker Building, San Francisco 4, California,
Attorney for Petitioner.

JUDD L. BLACK,
Oklahoma Natural Building,
Oklahoma City 2, Oklahoma,
Of Counsel.

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Petitioner, Clyde C. Winslow, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the District of Montana, Butte Division.

OPINIONS BELOW.

The District Court wrote no opinion. The opinion of the Court of Appeals is reported in 216 F. 2d p. 912. A copy of that opinion is appended hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 12, 1954. A copy of the judgment is appended hereto. A petition for a rehearing and motion to augment the record were filed on December 10, 1954 and denied by an order entered on February 7, 1955. On February 8, 1955, an order was entered staying issuance of mandate pending the filing, consideration and disposition of this petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 *U.S.C.* sec. 1254.

QUESTIONS PRESENTED.

1. If a bankrupt has so conducted himself that under the statute he has waived his right to a discharge but no order is entered to this effect (although such an order is required by the statute), does not such conduct commence the running of the period of limitations within which an indictment may be found?

2. If that period does not commence at the time of such conduct, does it commence at the time when the order of waiver should have been entered?

3. If that period does not commence at the time when the order of waiver should have been entered, does it commence when such order actually is entered?

4. Since the denial of a discharge starts the running of the period of limitations, is it not also started by the waiver of the right to a discharge?

5. If a Referee or a District Court in bankruptcy commits error by omitting to enter an order to the effect that a bankrupt has waived his right to a discharge, does such error deprive the bankrupt of the protection of the period of limitations in criminal cases?

6. If a Referee or a District Court in Bankruptcy omits entering an order denying a discharge in a case in which the bankrupt is not entitled to a discharge, does such omission deprive the bankrupt of the protection of the period of limitations in criminal cases?

7. When a bankrupt relies upon the Referee or District Court in bankruptcy to enter an order denying a discharge, as directed by the statute, does the period of limitations start to run when such order should have been entered, the law deeming done what should have been done, or has the bankrupt by his misplaced reliance interminably deprived himself of the protection of the period of limitations in criminal cases?

8. Since there is no provision in the statute (11 U.S.C. sec. 32) for an application for an order denying discharge, and on the contrary, under the statute,

petitioner's adjudication as a bankrupt operated *per se* as an application for a discharge, did it not become the duty of the Referee or District Court in bankruptcy to enter an order denying his discharge upon a showing of circumstances which by statutory definition constitute a waiver of the right to a discharge?

9. Could it have been the intent of the Congress to require in a case in which a discharge ought to be denied as provided in the statute (11 U.S.C. sec. 32) the bankrupt to formally petition for an order denying him a discharge before the criminal period of limitations would begin to run in his favor? If so, would not the Congress have added the words "upon petition by the bankrupt" (or words of similar import) at the end of section 32(e)?

10. Could it have been the intent of the Congress, and would it be valid, to provide that the criminal period of limitations begins to run in favor of a bankrupt when he has been denied a discharge but not when he has waived his right to obtain a discharge?

STATUTES INVOLVED.

11 U.S.C. sec. 32

Discharges, when granted

(a) The adjudication of any person, except a corporation, shall operate as an application for a discharge: Provided, That the bankrupt may, before the hearing on such application, waive by writing, filed with the court, his right to a discharge. A corporation may, within six

months after its adjudication, file an application for a discharge in the court in which the proceedings are pending.

(b) After the bankrupt shall have been examined, either at the first meeting of creditors or at a meeting specially fixed for that purpose, concerning his acts, conduct, and property, the court shall make an order fixing a time for the filing of objections to the bankrupt's discharge, notice of which order shall be given to all parties in interest as provided in section 94 of this title. Upon the expiration of the time fixed in such order or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed; otherwise, the court shall hear such proof and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard.

(c) The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under section 152 of Title 18; or (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case; or (3) obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in

any manner whatsoever, a materially false statement in writing respecting his financial condition; or (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy had been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this title; or (6) in the course of a proceeding under this title refused to obey any lawful order of, or to answer any material question approved by, the court; or (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: Provided, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt.

(d) When requested by the court, the United States attorney, located in the judicial district in which the bankruptcy proceeding is pending, or such other attorney as the Attorney General may designate, shall examine into the acts and conduct of the bankrupt and, if satisfied that probable

grounds exist for the denial of the discharge and that the public interest so warrants, he shall oppose the discharge of such bankrupt in like manner as provided in the case of a trustee.

(e) If the bankrupt fails to appear at the hearing upon the objections of his application for a discharge, or having appeared refuses to submit himself to examination, or if the court finds after hearing upon notice that the bankrupt has failed without sufficient excuse to appear and submit himself to examination at the first meeting of creditors or at any meeting specially called for his examination, he shall be deemed to have waived his right to a discharge, and the court shall enter an order to that effect.

18 U.S.C. sec. 3282

Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.

18 U.S.C. sec. 3284

Concealment of bankrupt's assets

The concealment of assets of a bankrupt or other debtor shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge.

STATEMENT.

Petitioner was convicted in the United States District Court for the District of Montana upon an indictment charging fraudulent concealment of the property of a bankrupt.

All of the facts appearing in this statement appear in the opinion of the United States Court of Appeals for the Ninth Circuit.

The indictment was found on October 16, 1951. It alleged fraudulent concealment continuously from April 24, 1947. Petitioner was adjudged bankrupt on May 12, 1947. The Trustee was elected and qualified on June 4, 1947. On April 26, 1947, petitioner was served with a subpoena, and on June 28, 1947, the Referee filed his certificate holding petitioner in contempt.

The record does not show that the Referee or the District Court ever entered the order required by 11 U.S.C. sec. 32(e) to the effect that petitioner had waived his right to a discharge in bankruptcy.

Nor does the record show an order granting or denying a discharge.

SUPPLEMENTAL STATEMENT.

On February 25, 1955, petitioner filed the following motion in the Court of Appeals, viz:

> "Appellant respectfully moves the Court for an order permitting him to file the petition tendered

herewith to augment the transcript of record to include the portions of the reporter's transcript of evidence and the exhibit described in said petition, and also permitting him to file the petition for a rehearing tendered herewith."

On March 28, 1955, the Court of Appeals denied the foregoing motion.

The evidence which petitioner desires to include in the transcript of record, is described in the proposed petition to augment the transcript of record to include a portion of the reporter's transcript and plaintiff's exhibit which was tendered with said motion, as follows:

"Appellant respectfully petitions the Court to permit the transcript of record to be augmented to include the following testimony of Thomas F. Kiley, a witness called on behalf of plaintiff United States, appearing on page 10 lines 6-14 as follows:

Q. State your name, please?
A. Thomas F. Kiley?
Q. What is your occupation, Mr. Kiley?
A. Attorney at law.
Q. Where do you reside?
A. Butte, Montana.
Q. I will ask you if you are presently the Referee in Bankruptcy in the Matter of the Bankruptcy of Clyde Winslow?
A. Yes, that is correct.

and appearing on page 14 lines 10-15 as follows:

Q. But the records do show there was meetings called?
A. Yes.

> Q. And that the bankrupt did not attend that meeting, and later there was contempt proceedings for him, and he did not attend, that will show in your records, would it not?
>
> A. Yes.

of the transcript of evidence adduced at the trial of this cause and prepared and certified correct by John J. Parker, official Court reporter of the United States District Court for the District of Montana, Butte Division, on February 7, 1955, which transcript will be lodged herewith with the clerk of this Court.

"Appellant also respectfully petitions the Court to permit the transcript of record to be augmented to include Plaintiff's Exhibit I, being File No. 5075 of the United States District Court, District of Montana, Missoula Division, entitled 'In the Matter of Clyde Winslow, d/b/a Missoula Lumber Company, alleged Bankrupt', received in evidence as shown on page 8 of said reporter's transcript, which exhibit is on file with the clerk of said District Court and can be certified to this Court.

"The foregoing testimony and the contentions of said bankruptcy file No. 5075 prove that appellant waived his right to a discharge under the provisions of 11 U.S.C. sec. 32(e), and remove the basis for that portion of this Court's opinion referred to by headnote 3 and found at the top of page 914 of the opinion (216 F.2d 912, 914) as follows:

> No testimony has been brought up in the record and no documentary evidence other than Winslow's adjudication of bankruptcy—'Plaintiff's

Exhibit No. 2'. Another document entitled 'Docket Entries' is included in the record but it does not appear to have been admitted in evidence. On the contrary, the attached certificate of the District Court Clerk recites that it is 'a true copy of the docket entries in Bankruptcy Case No. 5075, in the matter of Clyde Winslow * * * Bankrupt, as appears from the Bankruptcy Docket in my office as such Clerk.'

Even if we assume that it was judicially noticed by the trial court, the document would not furnish factual support for appellant's contention. The docket entries do not show that the bankrupt ever failed to appear at any hearing for examination of his assets, or pertaining to his discharge.

"The former motion to augment record filed herein on December 10, 1954, did not describe the specific evidence which appellant wished to include, because his new counsel was unable to determine the same until said reporter furnished said transcript and said counsel was not retained in time to obtain said transcript prior to the date it was necessary to file said former motion in connection with appellant's former petition for a rehearing. By reason of the omission from the former motion of a description of said evidence, this Court was required to pass thereon without the benefit of an official record and without knowledge of the nature of said evidence, and is now asked respectfully to reconsider its ruling in the light of the new evidence before it for the first time."

It is respectfully urged that this Court cause the transcript of record to be augmented in the foregoing

respects to remove the basis for the finding by the Court of Appeals that there is no foundation in fact for petitioner's contention that his right to a discharge in bankruptcy was waived (and therefore is to be deemed denied) more than three years before the indictment was found.

SPECIFICATIONS OF ERROR.

The Court of Appeals erred:

1. In denying petitioner's motion to augment the record to show by a transcript of the evidence that petitioner had waived his right to a discharge under the provisions of 11 U.S.C. sec. 32(e).

2. In holding that the permanent, irrevocable loss of the right to a discharge in bankruptcy is not the equivalent of an actual denial of such discharge.

3. In holding that the permanent, irrevocable loss of the right to a discharge in bankruptcy does not start the running of the period of limitations within which may be found an indictment for concealing assets in that bankruptcy.

4. In holding that a bankrupt who waives his privilege of escaping his civil obligations (i.e., waives his right to a discharge in bankruptcy) *ipso facto* waives his protection from criminal prosecution.

5. In holding that for the criminal offense of fraudulent concealment of property of a bankrupt the period of limitations is not jurisdictional and may be waived by a defendant by his failure to obtain

an order denying him the right to plead a discharge in bankruptcy in defending actions brought against him to enforce his civil debts.

6. In holding that the three-year period of limitations of 18 U.S.C. secs. 3282 and 3284 begins to run upon discharge or denial of discharge but not upon waiver or loss of right to a discharge.

7. In holding that it was not the duty of the Referee or District Court in bankruptcy to treat petitioner's adjudication as an application for a discharge and to deny the application when petitioner waived his right to a discharge.

8. In holding that it was within petitioner's power to apply for and secure the entry of an order denying discharge.

9. In holding that the Congress intended to protect from criminal prosecution a bankrupt who had been denied a discharge but not a bankrupt who had waived the right to a discharge.

10. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

To the best of petitioner's counsel's knowledge and belief, the case at bar is the only case in any Court involving the question whether the three-year period of limitations on finding an indictment for concealment of assets in bankruptcy under 18 U.S.C. sec. 3284, begins to run upon the waiver or loss of the right to a discharge in bankruptcy.

Research has found no other case in this Court or any Court of Appeals or District Court or other Court of or in the United States.

The period of limitations in a criminal case is jurisdictional. (See *People v. McGee,* 1 Cal. 2d 611, and compare *Pinkerton v. U. S.*, 145 F. 2d 252, and *U. S. v. Schneiderman,* 106 F. Supp. 892.) The Congress has declared that the Government will not prosecute crimes after the period has run and limited the power of the Courts to proceed thereafter (18 U.S.C. sec. 3282).

The concealment of assets in bankruptcy is a continuing offense only until *either final discharge or denial of discharge* (18 U.S.C. sec. 3284). In other words, a bankrupt who has been *denied* a discharge is given the same protection from criminal prosecution as one who has been *granted* a discharge.

Should not one who has waived or lost his right to a discharge, have the same protection?

Should not an offense which is terminated by *denial of a discharge,* in reason and in right be terminated by *waiver or loss of right to a discharge?*

11 U.S.C. sec. 32(a) provides for the voluntary written waiver of the right to a discharge.

11 U.S.C. sec. 32(b) provides for the examination into objections to a bankrupt's discharge.

11 U.S.C. sec. 32(c) requires that a discharge be granted except in certain circumstances.

11 U.S.C. sec. 32(d) provides for legal services in opposition to a bankrupt's discharge.

11 U.S.C. sec. 32(e) requires that certain conduct (including conduct occurring in the case at bar) be deemed to waive a bankrupt's right to a discharge, and requires the Court to enter an order to that effect when such conduct occurs.

In accordance with the usual rules of statutory construction, presumably it is incumbent upon the Court under 11 U.S.C. sec. 32(c) to deny a discharge in cases in which it does not grant a discharge, and under 11 U.S.C. secs. 32(a) and 32(c) to deny a discharge in cases in which there is a voluntary written waiver of the right to a discharge or conduct which by statutory definition constitutes a waiver of the right to a discharge. That this must have been the intent of the Congress, is confirmed by the last clause of 11 U.S.C. sec. 32(e) which expressly requires the Court to enter an order to that effect when a bankrupt by his conduct has waived his right to a discharge.

The omission of the entry of the Court order of waiver and a further order denying a discharge, which the statute requires and to which petitioner was entitled, should not operate to toll the start of the period of limitations.

Every bankrupt is entitled in due course to either a discharge or denial of a discharge. But there is no provision in the statute for an application *on behalf of the bankrupt* for an order denying a discharge. The adjudication of any person, except a corporation, operates as an application for a discharge (11 U.S.C. sec. 32(a)).

The grant of a discharge is an act of grace, a high privilege (*In re U. S. Restaurant & Realty Co.*, 187 F. 118, 120; *In re Northridge*, 53 F. 2d 858, 859) but the denial of a discharge is mandatory (*In re Margolis*, 23 F. Supp. 735, 737).

A discharge does not extinguish debts. It simply operates as a bar to their enforcement by judicial proceedings if the debtor chooses to plead his discharge. (*Helms v. Holmes*, 129 F. 2d 263, 266). One who has not been granted a discharge is in exactly the same position whether his right to a discharge was denied or waived and whether the denial or waiver was or was not entered of record.

It follows that the words "or a discharge denied" and "or denial of discharge" in 18 U.S.C. sec. 1284 should be construed to include cases in which the right to a discharge has been waived and in which an order denying discharge should have been, but actually was not, entered.

Although there are no cases construing the language of 18 U.S.C. sec. 1284 making concealment of assets of a bankrupt a continuing offense until discharge or denial of discharge, there are five cases construing its precursor, contained in a proviso to 11 U.S.C. sec. 52(d), which made concealment a continuing offense until discharge but omitted the words "or a discharge denied" and "or denial of discharge".

These cases are divided on the question whether the provision that concealment of assets of a bankrupt should be a continuing offense until final discharge,

should be construed to include cases in which the right to a discharge was denied.

The opinion which the other cases refer to as learned and exhaustive, is in the case of *U. S. v. Fraidin,* 63 F. Supp. 271 (D. Md.). In the *Fraidin* case a discharge had not been granted, nor had application ever been made for one. Under the law as it then was, the right to a discharge in the *Fraidin* case was lost by non-application by a date prior to three years before the indictment was found. The Court held that the loss of the right to a discharge was to be treated as though an order denying a discharge had been entered on the date the right to apply had expired, and that the statute should be construed to terminate the offense upon the granting *or the denial* of a discharge, and that therefore the period of limitations had run, and discharged the defendant.

In so holding the Court decided that any other construction would invalidate the statute, saying at p. 279:

> " * * * even if we assume that Congress might by express, clear language have completely abolished the three year limitation against prosecutions for concealment of assets by a bankrupt, it is obvious that by the language employed Congress did not intend so to do; and therefore, the question still remains to be answered: may Congress validly enact a statute of limitations whose language is so phrased as to result in affording no benefit of a time limit to some bankrupts and other persons and yet a definite time limit to others, although at the same time purporting to

embrace them all as offenders of the same class, having committed the same type of offense?"

The Court relied on a long line of decisions of this Court construing penal statutes of limitations favorably to the accused, namely:

Adams v. Woods, 2 Cranch 336, 2 L.Ed. 297;
U. S. v. Irvine, 98 U.S. 450, 25 L.Ed. 193;
Gompers v. U. S., 233 U.S. 604, 34 S.Ct. 693, 58 L.Ed. 1115; and
Pendergast v. U. S., 317 U.S. 412, 63 S.Ct. 268, 87 L.Ed. 368.

The doctrine that penal statutes of limitations are to be construed in favor of repose and so as to avoid interminable periods of limitation when not expressly provided by the statute, was followed in the case of *U. S. v. Zisblatt Furniture Co.,* 78 F. Supp. 9 (S.D. N.Y.).

The United States appealed the dismissal of the *Zisblatt* indictment to the Court of Appeals which certified the case to this Court on the ground it had no jurisdiction of the appeal (172 F. 2d 740; 2d Cir.). The appeal then was dismissed on motion of counsel for the United States (336 U.S. 934, 69 S.Ct. 750, 93 L.Ed. 1093).

The *Zisblatt* case is later chronologically than two other cases from the Southern District of New York which reach the opposite result, namely, *U. S. v. Newman,* 63 F. Supp. 269 (S.D.N.Y.), and *U. S. v. Nazarro,* 65 F. Supp. 456 (S.D.N.Y.), and also a

Pennsylvania case, *U. S. v. Ganaposki,* 72 F. Supp. 982 M.D. Pa.).

None of the three cases reaching a result contrary to that reached in the *Fraidin* and *Zisblatt* cases, holds that the *loss or waiver* of the right to a discharge is not the equivalent of the *denial* of a discharge. They hold only that since the statute (11 U.S.C. sec. 52 (d)) made concealment a continuing offense until discharge, the denial of a discharge could not operate to terminate the offense.

Both the *Fraidin* and *Zisblatt* cases hold specifically that the loss of the *right to apply* for a discharge is to be treated as a *denial* of a discharge, in addition to holding that the denal of a discharge, as well as the granting of a discharge, starts the period running.

Since the new statute (18 U.S.C. sec. 3284) expressly provides that the period of limitations starts upon denial as well as upon granting of a discharge, it is not necessary to choose between conflicting lines of cases.

Given the new statute, there is no conflict among the cases. No case holds that the waiver of the right to a discharge is not to be treated as the denial of a discharge. In fact, all of the cases cited, hold that a waiver is a denial or is to be treated as a denial of discharge.

In holding that the waiver by his conduct of the right to a discharge is not to be treated as a denial of a discharge as of the time of such conduct as shown

by the Contempt Certificate in the case at bar, the Court of Appeals made an unique decision unsupported by precedent. This decision that waiver of a right to a discharge is different from the denial of a discharge, appears to be based on the misconception that petitioner "had full control of the situation [since] it was within his power to apply for, and secure the entry of, an order denying discharge if it were not possible for him to secure a discharge, [and] the order would have been sufficient to start the running of the three-year period of limitation" (216 F. 2d 912, 915). Not being a corporation, petitioner could not apply for a discharge, much less for the denial of a discharge (11 U.S.C. sec. 32(a)). His adjudication on May 12, 1947 (R. 13) operated as an application for discharge, and it was the duty of the Court to enter orders waiving his right to a discharge and denying him a discharge on June 28, 1947 (R. 14).

Every bankrupt is entitled in due course to either a discharge or denial of a discharge. Under the statute a bankrupt is not required to nor can he ask that the Court deny him the right to plead a bankruptcy discharge in defense of his civil obligations, in order to obtain protection from criminal prosecution. Petitioner should not be penalized because a Court omitted to perform its statutory duty of entering an order of waiver of discharge and denying a discharge.

According to the language of the original statute, only the granting of a discharge started the criminal period of limitations. Under it the cases were divided

on the question whether the denial of a discharge (or the waiver of the right to a discharge, which concededly was for this purpose tantamount to a denial) also started the criminal period of limitations. When the Congress enacted the present statute it expressly made the period begin to run from discharge or denial of discharge and, it is submitted, it omitted the word "waiver" only because all of the cases in the books either held or assumed that waiver was the equivalent of denial insofar as the criminal period of limitations is concerned.

The case at bar is the first and only case holding that waiver is not the equivalent of denial and such holding, it is submitted, would invalidate the statute for unequal protection of the laws as stated in the *Fraidin* case (63 F. Supp. 271, 279) in the language hereinabove quoted.

The decisions of this Court previously cited herein are authority for the proposition that statutes of limitations in criminal cases are to be construed liberally in favor of the accused. The Congressional intent favors repose and prosecution within a period within which evidence in defense can reasonably be expected to be available. Such statutes are to protect the guilty as well as the innocent. Interminable periods of limitations have been avoided consistently by the cases unless expressly provided by statute, especially in non-capital cases.

CONCLUSION.

This petition for writ of certiorari should be granted for the foregoing reasons.

Dated, April 5, 1955.

Respectfully submitted,

JOHN R. GOLDEN,
Attorney for Petitioner.

JUDD L. BLACK,
Of Counsel.

(Appendix Follows.)

United States Court of Appeals for the
Ninth Circuit

Clyde C. Winslow, Appellant, vs. United States of America, Appellee.	No. 14,255 Nov. 12, 1954

Appeal from the United District Court
for the District of Montana,
Butte Division

Before: ORR and FEE, Circuit Judges; and
DRIVER, District Judge.

DRIVER, District Judge:

Winslow appeals from a judgment, based upon the verdict of a jury, convicting him of fraudulent concealment of the property of a bankrupt. The only question presented is whether the indictment was barred by limitation.

The pertinent allegations of the indictment may be summarized briefly as follows:

Winslow, continuously from April 14, 1947 to the date of the indictment (October 16, 1951), fraudulently and knowingly concealed personal property, consisting of money, from his Trustee in Bankruptcy

and from his creditors. He was adjudged bankrupt on May 12, 1947, and the Trustee was elected and qualified on June 4, 1947.

In the District Court, before the trial, Winslow moved to dismiss on the ground, among others, that the indictment was not found within three years after the commission of the offense. The motion was denied. The record does not show whether it was renewed or the defense of the statute of limitations was otherwise asserted in any manner at any stage of the trial.

Section 3282 of Title 18, U.S.C.A., places a general three-year limitation on the prosecution of federal offenses not capital. Section 3284 of the same title provides that, concealment of assets of a bankrupt shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge.

On consideration of the motion to dismiss, the trial court was limited to the face of the indictment and was obliged to accept the facts therein alleged as true.[1] On its face, the indictment shows that the offense charged (concealment of the assets of a bankrupt) continued up to the date of the indictment.

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[1] *United States v. Mertine*, 64 Fed. Supp. 792, 794; *United States v. Universal Milk Bottle Service*, 85 Fed. Supp. 622, 625 (Affirmed—*Universal Milk Bottle Service v. United States* (6 Cir.), 188 F.2d 959). See also, *United States v. Cook*, 84 U. S. 168, 178; and, *Knoell v. United States* (3 Cir.), 239 Fed. 16, 19.

There is no allegation that the bankrupt ever was discharged or denied a discharge. The indictment does not show that the offense was barred by limitation and the motion to dismiss was properly denied.

However, appellant directs our attention to the language of the Bankruptcy Act (Title 11, U.S.C.A. Sec. 32(e), that, "If the bankrupt fails to appear at the hearing upon the objections to his application for a discharge * * * he shall be deemed to have waived his right to a discharge, and the court shall enter an order to that effect", and in his brief states that, "Winslow failed to appear for examination of his assets or for a final discharge and was issued a contempt citation on June 28, 1947." Appellant contends that, since he lost his right to a discharge at that time, he should be deemed to have been denied discharge more than three years before the indictment was found.

The contention is untenable. It has neither factual nor legal foundation. No testimony has been brought up in the record and no documentary evidence other than Winslow's adjudication of bankruptcy—"Plaintiff's Exhibit No. 2". Another document entitled "Docket Entries" is included in the record but it does not appear to have been admitted in evidence. On the contrary, the attached certificate of the District Court Clerk recites that it is "a true copy of the docket entries in Bankruptcy Case No. 5075, In the matter of Clyde Winslow * * * Bankrupt, as appears from the Bankruptcy Docket in my office as such Clerk."

Even if we assume that it was judicially noticed by the trial court,[2] the document would not furnish factual support for appellant's contention. The docket entries do not show that the bankrupt ever failed to appear at any hearing for examination of his assets, or pertaining to his discharge.[3]

Appellant relies upon two district court cases, *United States v. Fraidin,* 63 F. Supp. 271, and *United States v. Zisblatt Furniture Co.,* 78 F. Supp. 9. Both of them were decided prior to the revision of Title 18, U.S.C., in 1948. Section 3284 of Title 18, formerly was a proviso to Section 52(d) of Title 11, U.S.C., 1940 Ed. Before revision, it provided that concealment of assets of a bankrupt should be a continuing offense until final discharge and that the period of limitation should not begin to run until such final discharge. After the revision, Section 3284 made the offense a continuing one until final discharge *or*

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[2]Ordinarily a court will not take judicial notice of the record in other or different proceedings unless it is produced and put in evidence. 20 Am. Jur. 105; *National Surety Co. v. United States* (9 Cir.), 29 F.2d 92, 97; *Paridy v. Caterpillar Tractor Co.* (7 Cir.), 48 F.2d 166, 168; *Benetti v. United States* (9 Cir.), 97 F. 2d 263, 266; *Walker v. United States* (9 Cir.), 113 F.2d 314, 318; *Funk v. Commissioner of Internal Revenue* (3 Cir.), 163 F.2d 796, 801.

[3]None of the documents mentioned in the docket entries is set out in the printed record. The only entries which could possibly have any bearing on appellant's contention are the following: ". . . Apr. 25, 1947—Filed Subpoena to Alleged Bankrupt. (Not served.) Apr. 25, 1947—Filed praecipe for issuance of another subpoena to Alleged Bankrupt. Apr. 25, 1947—Issued Subpoena to Alleged Bankrupt. May 5, 1947—Filed Subpoena to Alleged Bankrupt (served on Alleged Bkt. on Apr. 26, 1947). . . . June 28, 1947—Filed Certificate of Referee as to Facts, Constituting Contempt on the part of the Bankrupt, Clyde Winslow." . . .

denial thereof, and expressly provided that the limitation period should commence to run either upon discharge *or denial of discharge.*

In the Fraidin case an individual bankrupt had, by operation of then existing law, become forever foreclosed of the right to a discharge on a date more than three years prior to the return of an indictment charging him with concealment of assets of his bankruptcy estate. The Court reasoned that, if the statutory provision as it then stood were literally and strictly applied (that the period of limitation would not begin to run until the bankrupt's discharge), it would mean that prosecution of the offense would never be barred since the right of discharge had been lost. The Court concluded that Congress could not have intended such an unreasonable, oppressive, and absurd result and construed the statute as though the words, "or until denial thereof," had been added thereto, so that the period of limitation would commence upon the denial of discharge as well as upon discharge. The Court held that the bankrupt should be deemed to have been denied a discharge upon the date he finally lost the right of discharge and, therefore, that the offense was barred by limitation.

In the *Zisblatt Furniture Co.* case, which involved concealment of assets of a corporate bankrupt, the district court followed substantially the same reasoning and reached a similar result.

In three other cases district courts took a contrary view. They reasoned that, since the intent of Con-

gress was clearly expressed in the plain and unambiguous language of the statute, the three-year limitation did not begin to run until final discharge of the bankrupt.[4]

It is not necessary for us to choose between the conflicting lines of decision as the cases are not in point here in view of the change that has been made in the statute. The revision of Title 18 made the very same addition to the prior law which the Court in the Fraidin case held should be made to express the legislative intent, namely, the provision that the period of limitation would commence to run upon denial or discharge as well as upon discharge. It may be assumed that Congress made the change advisedly and that, the statute as it now stands expresses the intent of that body.[5] Application of the statute in the present case entails no unreasonable, oppressive, or absurd result. Winslow had full control of the situation. It was within his power to apply for, and to secure the entry of, an order denying discharge if it were not possible for him to secure a discharge. The order would have been sufficient to start the running of the three-year period of limitation.

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[4]*United States v. Newman,* 63 F. Supp. 269; *United States v. Nazzaro,* 65 F. Supp. 456; and *United States v. Ganaposki,* 72 F. Supp. 982.

[5]The revisor's note, following Section 3284, of Title 18, U.S.C.A., reads in part as follows: "The words 'or a discharge denied' and 'or denial of discharge' were added on the recommendation of the Department of Justice to supply an omission in existing law."

We find no error in the record and the judgment is affirmed.

(Endorsed:) Opinion. Filed Nov. 12, 1954.
Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit

Clyde C. Winslow, Appellant, vs. United States of America, Appellee.	No. 14,255

JUDGMENT

Appeal from the United States District Court for the District of Montana, Butte Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana, Butte Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: November 12, 1954,
PAUL P. O'BRIEN, Clerk.